(2)

Supreme Court, U.S.
FILED
OCT 28 1997
CLERK

97-518
NO.

In The
Supreme Court of the United States
October Term, 1997

ESTATE OF DAVID MILLER
FRED DAVIS
GERTRUDE DAVIS GOROD

Petitioners,

v.

EDITH TABACHNICK
APPEALS COURT
BRISTOL COUNTY PROBATE COURT

Respondents.

On Petition for Writ of Certiorari
To the Massachusetts Supreme Judicial Court

RESPONDENT EDITH TABACHNICK'S BRIEF IN OPPOSITION

Joseph S. Provanzano, Esq,
Counsel of Record
16 Bourbon Street
Peabody, MA 01960
(978) 535-8222

October 21, 1997

NO.

In The
Supreme Court of the United States
October Term, 1997

ESTATE OF DAVID MILLER
FRED DAVIS
GERTRUDE DAVIS GOROD

Petitioners,

v.

EDITH TABACHNICK
APPEALS COURT
BRISTOL COUNTY PROBATE COURT

Respondents.

On Petition For Writ of Certiorari To the Massachusetts Supreme Judicial Court

---

RESPONDENT EDITH TABACHNICK'S BRIEF IN OPPOSITION

Joseph S. Provanzano, Esq.
Counsel of Record
16 Bourbon Street
Peabody, MA 01960
(978) 535-8222

October 21, 1997

QUESTIONS PRESENTED

Respondent respectfully disagree with Petitioners' statement of the question presented. In Respondents' view, the actual questions presented in this case are the following:

(1) Does the Massachusetts State Supreme Court's decision present any compelling reason to warrant a writ of certiorari?

(2) Do independent and adequate state grounds support the judgment of the Massachusetts Supreme Judicial Court?

(3) Does the Respondent present any valid jurisdictional grounds for this Petition to be properly before this Court?

STATEMENT OF THE CASE

Respondent adopts by reference the statement of the case presented by the Supreme Judicial Court of Massachusetts. Petition App. A 1. Respondent specifically disagrees with the vast majority of Petitioners' statement, and therefore will lay out as briefly as possible Respondent's statement of the case.

The Petitioners' and the Respondent, Edith Tabachnick's, uncle David Miller died intestate in September of 1989 leaving a brother, John Miller, who has since died, Gertrude Davis Gorod (niece) and Fred Davis (nephew) (hereafter "Petitioners"), and Edith Tabachnick (niece) (hereafter "Respondent") as the

only remaining heirs to his estate. Contrary to Petitioner's assertion otherwise, Respondent is in fact a legal heir to the estate of David Miller.

On or about March of 1990, Petitioner Davis applied for and was allowed at pre-trial conference, to be administrator of that estate in the Bristol County Probate Court in Massachusetts. Mr. Davis listed the items of the estate to be a 1977 Plymouth Volare (Est. $ 750.00) and approximately $ 8,500.00 in a savings account at the Shawmut Bank. In addition the estate contained two parcels of land in Raynham, Massachusetts at 1667 Broadway and parcel across the street.

On or about August 24, 1995, the Petitioner, Edith Tabachnick, filed a

petition to remove Petitioner, Fred Davis, as administrator of the estate because of unsuitability and for waste of assets and neglect. This petition was allowed on March 5, 1996 by Bristol County Probate Judge Elizabeth O'Neill Lastaiti. In that order the judge stated that there was no need to appoint a successor administrator because the only issue remaining was the distribution of the real estate, which passed by law, between the three remaining heirs at the death of the decedent, David Miller. The judge stated that if the parties could not resolve their differences one of the heirs would have to file a Petition to Partition. Based on this order the respondents' erroneously interpreted this ruling and filed a motion to compel the respondent to sell the property, Justice

Prudence McGregor of the Bristol County Probate Court correctly denied this motion.

The Petitioners appealed this decision but, as result of respondent's opposition motion, that appeal was correctly dismissed by Judge LaStaiti on May 7, 1996, because Petitioners had failed to comply with Rule 8 (b) (3) of the Massachusetts Rules of Appellate Procedure and because that failure was due to "inexcusable neglect". The Judge further ordered that "no other pleadings of any type, with the exception of a Petition to Partition, may be filed in *this* court".

On May 30, 1996 the Petitioners filed a notice of appeal of Judge LaStaiti's

May 7, 1996 order. On June 11, 1996 the Appeal Court's Honorable Roderick Ireland denied Petitioner's appeal "without hearing". On June 13, 1996 Petitioners filed a motion for clarification of Judge Ireland's decision and a motion for clarification of his June 11, 1996 order which was denied on June 26, 1996. The notice of appeal was also struck on this same date.

On July 8, 1996 the Petitioners filed an appeal with the Massachusetts Supreme Judicial Court pursuant to Massachusetts General Laws, chapter 211, section. 3. This appeal was denied without hearing by Justice John Greaney on October 23,1996. They appealed to the full court of the Massachusetts Supreme Judicial Court, were granted oral argument and the full

Court correctly affirmed the single justice's denial of their petition for relief.

The Petitioners, throughout this whole ordeal, have been given every opportunity to convince several appellate courts that there is any merit to any of their baseless claims. And each and every court that has reviewed there claims has properly dismissed that appeal or affirmed the earlier ruling, And in so doing they have neither violated any Federal or State rights of the Petitioners, or even addressed any Federal questions of law, as these issues were never properly before any lower appellate courts nor are they properly before this Court.

REASONS FOR DENYING THE WRIT

First and foremost, The Massachusetts Supreme Judicial Court correctly decided this case as a matter of Massachusetts Appellate law. In deciding this case, the Court in this matter interpreted Massachusetts case law and its own rules of appellate procedure, and therefore, independent and adequate State Grounds support the judgment of the Massachusetts Supreme Judicial Court. It did not address, and properly so, any Federal questions of law or statutes as these issues were not before the Massachusetts Supreme Judicial Court. The decision below was plainly correct application of settled law, and no conflict among the circuits is even alleged.

Furthermore, the questions presented as framed by the Petitioners, are not of sufficient importance to justify this Court's exercise of its certiorari power. The very fact that the majority of Respondent's issues, have not arisen before suggest that it does not go beyond "the academic or the episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). While the issues may be "important" to the Petitioners, they have not shown that it is important to the public at large. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). Respondent respectfully submits that this Court ought not squander its resources reviewing an issue of marginal importance, particularly in light of the substantive flaws presented in the argument in support of the Petition as

well as the substantive flaws in the issues presented to this Court by the Petitioner.

I. INDEPENDENT AND ADEQUATE STATE GROUNDS SUPPORT THE JUDGMENT OF THE MASSACHUSETTS SUPREME JUDICIAL COURT.

The essence of the holding of the Massachusetts Supreme Judicial Court below was that the Petitioners failed to comply the Massachusetts Rules of Appellate procedure and that they could have availed themselves of other relief available to them under Massachusetts Probate Rules and remedies provide under Massachusetts case law. Petition App 20. The Massachusetts Supreme Judicial Court did not analyze nor did they even address, Petitioners contentions of

alleged violations of their rights under the United States Constitution, Amendments V and XIV. These issues were not properly before that Court.

Wherever it appears that the decision of a state court "might" have rested on an independent and adequate nonfederal ground, the Supreme Court lacks jurisdiction to review it. Ellis v. Dixon, 349 U.S. 458, 459 (1955); Stembridge v Georgia, 343 U.S. 541, 547 (1952). Thus this Court has declined to undertake review of state court decisions when it has not affirmatively appeared from the record that a decision on a federal question was necessary to the determination of the case. Durley v. Mayo, 351 U.S. 277, 281 (1956). See Black v. Cutter Laboratories, 351 U.S. 292,

299-300 (1956). Here its is certain that the Supreme Judicial Court's decision not only might have, but most certainly did, rest on an interpretation of Massachusetts case law and its own rules of appellate procedure. Accordingly, the Petition should not be granted.

II. THE DECISION BELOW CONFLICTS WITH NO FEDERAL AUTHORITY, AND ITS CORRECTNESS PRESENTS NO QUESTION OF SUFFICIENT IMPORTANCE TO JUSTIFY REVIEW BY CERTIORARI.

The Petitioners have not even attempted to assert, and rightfully so, that the decision of the Massachusetts Supreme Judicial Court "squarely conflicts with decisions of this Court and Federal Courts of Appeals." They have

cited no relevant federal case law as pertains to the issues they would have this Court take up, and in fact no such case law exists.

Furthermore, the questions presented as framed by the Petitioners, are not of sufficient importance to justify this Court's exercise of its certiorari power. The very fact that the majority of respondent's issues, have not arisen before suggest that it does not go beyond "the academic or the episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). While the issues may be "important" to the Petitioners, they have not shown that it is important to the public at large. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923).

III. RESPONDENT PRESENTS NO VALID JURISDICTIONAL GROUNDS FOR THIS PETITION TO BE PROPERLY BEFORE THIS COURT.

The Respondent fails to state the specific jurisdictional grounds for this Petition to be properly before the Court. In Respondent's brief the Respondent vaguely asserts Section 28 of the United States Code as its jurisdictional grounds. This is purposefully vague as there is no valid jurisdictional ground that would permit Respondents' Petition to be properly before this Court. Therefore Respondent's Petition should be dismissed.

CONCLUSION

This case was decided solely on interpretation of Massachusetts case law and its rule of Appellate procedure and therefore independent and adequate state grounds support the judgment of the Massachusetts Supreme Judicial Court. The Massachusetts Supreme Judicial Court opinion that is the subject of this appeal conflicts with no Federal authority, and its correctness presents no question of sufficient importance to justify review by certiorari.

For all of these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Joseph S. Provanzano, Esq.
Counsel of Record
16 Bourbon Street
Peabody, MA 01960
(978) 535-8222